

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Tracey Docherty

(“Docherty”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/686

DATE OF HEARING: May 20th, 1998

DATE OF DECISION: July 2, 1998

DECISION

APPEARANCES

Robert Docherty for Tracey Docherty

Catherine Hunt &
Dave MacKinnon for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Tracey Docherty (“Docherty”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. DDET 00954 issued by the Director of Employment Standards (the “Director”) on August 25th, 1997 under file number 024-470 (the “Determination”).

The Director’s delegate determined that Docherty was a director or officer of D.E. Installations Ltd. and by reason of that status, and in accordance with section 96 of the *Act*, was liable for \$70,280.15 in unpaid wages.

Ms. Docherty did not appear in person at the appeal hearing but was represented by her spouse, Mr. Robert Docherty, who appeared as her agent. Mr. Docherty advised me at the outset of the appeal hearing that Tracey Docherty was not challenging the Director’s determination that she was an officer or director of D.E. Installations Ltd. The position taken by Mr. Docherty is quite understandable given that Tracey Docherty is recorded in D.E. Installation Ltd.’s official corporate records, as well as in various day-to-day corporate documents, as the president and secretary and a director of the company.

ISSUES TO BE DECIDED

In a letter dated September 10th, 1997 addressed to the Tribunal, and appended to her appeal form, Ms. Docherty asserted that the Director’s delegate erred in calculating the unpaid wage liability of D.E. Installations Ltd. and that, accordingly, her own liability is similarly in error.

Additionally, Ms. Docherty asserts that the Director’s delegate misinterpreted section 96 of the *Act*.

FACTS AND ANALYSIS

A determination was issued against D.E. Installations Ltd. under number CDET 006434 on June 20th, 1997 in the amount of \$96,207.26 representing unpaid wages owed to some 22 former D.E. Installations Ltd. employee. These wages were found to be due and payable in accordance with the *Skills Development and Fair Wage Act* and the *Skills Development and Fair Wage Regulation*. I shall hereafter refer to this latter determination as the “corporate determination”.

Subsequently, D.E. Installations Ltd. appealed the corporate determination and following four days of hearings (resulting in two separate Tribunal decisions--D397/97 issued January 14th, 1998 and D165/98 issued April 21st, 1998), the corporate determination was varied to reflect a total liability to the 22 employees named in the determination of \$87,532.46 plus some additional accrued interest (see section 88 of the *Act*).

The principal argument advanced by the appellant concerns the proper interpretation of section 96 of the *Act* which provides as follows:

Corporate officer's liability for unpaid wages

96. (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

(b) vacation pay that becomes payable after the director or officer ceases to hold office,

(c) money that remains in an employee's time bank after the director or officer ceases to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

None of the limitations set out in subsection 96(2) is relevant here.

Ms. Docherty submits that the effect of section 96(1) is to create a statutory liability for unpaid wages based on the total amount owed to an employee in any 2-month period, although which 2-month period one is supposed to choose was not made clear to me--presumably, the 2-month period that leaves the greatest wage liability although in her September 10th letter to the Tribunal she suggested that the liability would be based on the “last two months of employment for each employee”.

Thus, according to the appellant's submission, if an employee's wages were, say, \$2,000 per month but that employee only received \$1,500 per month in the last 3 months of their employment, the director/officer liability under section 96 with respect to that employee would be \$1,000 (*i.e.*, 2 x \$500) rather than the total wage unpaid wages of \$1,500. I reject this submission.

In my view, section 96 creates an unpaid wage liability "ceiling" based on an employee's monthly wage. Accordingly, if an employee's "regular wage" (see section 1) was \$2,000 per month, the unpaid wage liability of a director or officer for that employee would be the lesser of \$4,000 (*i.e.*, 2 x \$2,000 per month) or the actual amount of the employee's unpaid wages.

If the appellant's position as set out in her September 10th letter was adopted, a truly absurd result would obtain. In circumstances where the employee's wages had not been paid in full, the directors and officers of the company need only ensure that the employee was underpaid, say by \$1 in each of the last two months of employment, and would thereby fix their personal liability under section 96 at \$2, irrespective of the actual amount of the employee's unpaid wages. I cannot conceive that this sort of manipulation could be lawfully accomplished using section 96 as it is currently drafted. Section 96(1) simply restates what section 19(1) of the former Act mandated, namely, a corporate officer or director may be held personally liable for employees' unpaid wages, but such liability cannot exceed the equivalent of two month's wages per employee.

Given the Tribunal's earlier variance (from \$96,207.26 to \$87,532.46) of the amount due under the corporate determination (EST Decision No. D165/98), it may be that Ms. Docherty's current liability as set out in the Determination (\$70,280.15) is not accurate. Accordingly, I believe it appropriate to refer that matter back to the Director for review, and if appropriate, recalculation.

ORDER

Pursuant to section 115 of the *Act*, I order that the within Determination be referred back to the Director solely for the purposes of recalculating the appellant's wage liability in accordance with section 96 of the *Act* and the Tribunal's decision with respect to the appeal of the corporate determination. The Determination is confirmed in all other respects.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal